EASEMENTS—RIGHT OF WAY OVER RAILROAD PROPERTY ACQUIRED BY PRESCRIPTION.

A discussion of this question is suggested by a case decided by the Supreme Court of South Carolina, *Blume v. Southern R. R. Co.*, 67 S. C., 546. In this case the plaintiff in the court below recovered judgment against the railroad for obstructing an alleged street in the town of Bamberg, by building there a depot and platform, thereby blocking the way to and from the plaintiff's premises. The alleged street was a part of defendant's right of way. Plaintiff attempted to show title by prescription in the town to that portion of defendant's right of way in question by showing an adverse use thereof by the public as a street for more than twenty years. The court refused to recognize this right, and held that, since prescription rests on the presumption of a grant, which the railroad company had no power to make, for other purposes than those for which it acquired the land, no prescriptive easement of right of way could be acquired against the railroad.

Upon this question there is diversity of opinion in the State courts, some holding that a right of way may be acquired over a railroad property by prescription while others deny that such a right exists.

The California courts deny that this right exists, basing their reasoning on the ground that railroads are a species of public highway, *Moran v. Ross*, 79 Cal., 159, and that individuals, although they may intrude upon or obstruct the public thoroughfare, cannot acquire title by prescription to such land. *San Francisco v. Bradbury*, 92 Cal., 414.

A conveyance to a railroad of a right of way is a dedication to the public use. *Venable v. Wabash R. R. Co.*, 112 Mo., 103. Jones on "Easements," Sect. 281, p. 232, lays down the rule that the prescriptive right to a passage way along the track of a railroad cannot be acquired by the public or by individuals while the railroad is constantly using a single track over such right of way.

The view in opposition to that as expressed in the principal case, has received the sanction of the courts of many jurisdictions, a few of which are the Supreme Court of Illinois, in *Illinois Central*

R. R. Co. v. Wakefield, 173 Ill., 564; the Supreme Court of Michigan in the case of *Matthews v. Lake Shore and M. S. R. R. Co.,* 110 Mich., 170; and the Supreme Court of Indiana in *The Pittsburgh, Cincinnati, Chicago and St. Louis R. R. Co. v. Stickly,* 155 Ind., 312. In the Indiana case the court said that "adverse possession of land acquiesced in by a railroad company for the statutory period prevents a recovery of such land. A railroad is not a public highway in the sense that it belongs to the people. The statute enables the railroad to take land in fee and forbids interference with the company's exclusive use, but this right must be asserted. If one occupies adversely for twenty years, land owned by a railroad company, the statute of limitations should raise a presumption of a grant. The State confers the right of eminent domain to enable a railroad to perform efficiently its duties as common carrier, but it is not evident why the State should be concerned in preventing investors in railroad stock from sustaining loss through the negligence of their agents."

A review of the decisions of the State courts shows that the weight of authority is contrary to that of the principal case, and the better opinion seems to be that when a railroad, by its negligence, has permitted the use of its land by the public under such conditions and circumstances as would give the public a right thereto, under the doctrine of adverse possession, if such land were owned by an individual, such right should not be denied merely because the land used belonged to a railroad company.

THE ABOLITION OF THE DEFENSE OF INSANITY IN CRIMINAL CASES IS UNCONSTITUTIONAL.

The frequency with which the plea of insanity has been interposed in criminal cases within recent years, and the gross miscarriage of justice resulting from it in many instances, have caused agitation in some quarters for the abolition of the defense altogether. The Special Committee of the New York Bar Association on the Commitment and Discharge of the Criminal Insane, made, at the meeting of the Bar Association on January 18, 1910, among others, the following recommendations: "Your Committee, therefore, recommend this question for earnest consideration. Has not the time come in the development of our system of penology to relegate to the realm of the obsolete, the assumption that an